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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1008

[illegible] and DOROTHY LEE HOYLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 895

BOB and DOROTHY LEE HINDES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's findings of fact and conclusions of law (R. 83-86) are reported at 214 F. Supp. 583. The opinion of the court of appeals (R. 211-216) is reported at 326 F. 2d 150.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1964. The petition for a writ of cer-

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"R." references are to the printed record in the proceedings before the Court of Appeals for the Fifth Circuit.

tiorari was filed on March 7, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly found that a corporation had been created and used as a conduit for the sale of petitioner's ranch solely in order to reduce taxes by transforming a cash transaction into an installment sale of the property.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 453. INSTALLMENT METHOD.

(a) *Dealers in Personal Property.*—Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

(b) *Sales of Realty and Casual Sales of Personalty.*—

(1) *General rule.*—Income from—

(A) a sale or other disposition of real property, or

(B) a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of

the taxable year) for a price exceeding $1,000,

may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

* * * * *

(26 U.S.C. 1958 ed., Sec. 453.)

STATEMENT

In the spring of 1957 petitioner[2] entered into negotiations for the sale of his ranch to F. B. Sechrist. Petitioner discussed with his attorney the tax consequences of such a sale and was advised that an installment sale would result in considerable tax saving. The purchaser was unwilling to purchase by installments, however, and petitioner entered into a written contract of sale for $300,000 cash on which a $5,000 earnest money deposit was paid by Sechrist (R. 14, 15, 19, 23, 25, 27-31, 83-84, 98).

Petitioner's attorney thereafter suggested that the tax saving could be achieved by creating a corporation to which petitioner would sell his ranch on an installment contract, and that the corporation could then sell the ranch to Sechrist for cash. Sechrist agreed to take title from the corporation on the promise that the property would be sold to him at the $300,000 cash price (R. 13, 19-20, 23, 25-26, 84).

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[2] Although both Mr. and Mrs. Hindes are petitioners in this case because they filed a joint 1957 tax return, we use "petitioner" with reference to Mr. Hindes, who alone engaged personally in the relevant transactions.

Pursuant to this plan, the Tower Farm & Cattle Company, Inc. ("Tower") was chartered under Texas law. The incorporators and sole stockholders were petitioner's mother and father and his attorney (R. 11; 14, 26-27, 79, 84, 97). Petitioner then sold his farm to Tower for a total of $265,000, of which approximately $20,000 was paid in cash with the balance due over a period of ten years. Petitioner did not retain a deed of trust or lien of any kind to secure the unpaid balance of the purchase price (R. 20-21, 32-37, 84-85).

Approximately a month later, Tower deeded the farm to Sechrist for $300,000 cash. A $58,000 first mortgage was paid by Tower, in addition to a real estate commission of $15,000. At this time Tower also paid the first $20,000 installment on the note held by petitioner (R. 23-24, 68-76, 85, 99, 101-102, 110-111). Six days after these transactions, Tower made an unsecured 4 percent loan to petitioner in the amount of $200,000. The note contained none of the standard provisions regarding default which are customarily included in such promissory notes (R. 21, 42, 85).

The Tower corporation engaged in no other business (R. 196). It was dissolved in January 1959 (R. 154, 193), at a time when petitioner owed Tower approximately $180,000, and Tower owed petitioner approximately $165,000 (R. 154). Petitioner's attorney realized a profit on this arrangement of approximately $6000 (R. 194-195).

In their 1957 joint tax return, petitioners treated the sale as an installment transaction under Section 453(b) of the Internal Revenue Code of 1954 (R. 41). The Commissioner disallowed this claim and treated the sale as having been made by petitioner directly to Sechrist for cash.[1] Petitioners paid the assessed deficiency—which also included adjustments other than the one relevant in this case—and sued for a refund in the district court. Cross-motions for partial summary judgment on the present issue were filed, and the district court granted the government's motion (R. 86-87). Petitioners' other claims were settled, and final judgment was entered (R. 200).

The court of appeals held that the district court was correct in treating the sale as a direct one between petitioner and Sechrist with the corporation being a mere conduit used for tax avoidance purposes. It concluded that summary judgment was warranted as to the $265,000 which was to be received by petitioner from Tower, but it held that there was a genuine issue of fact as to whether the additional $35,000 received by the corporation from Sechrist should be considered income to petitioner. Consequently, it reversed and remanded the case for trial on that issue of fact.

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[1] The revenue agent who originally audited the return treated only $265,000 as received by petitioner; on administrative appeal it was determined that the full original sale price of $300,000 should be treated as having been received in 1957. It was with reference to this $35,000 difference that the court of appeals remanded the case for trial.

ARGUMENT

The decision below is correct and there is neither a conflict of decisions nor any other reason for review by this Court.

The decision of the court of appeals followed principles announced in this Court's opinion in *Commissioner* v. *Court Holding Co.*, 324 U.S. 331. In that case the taxpayer corporation negotiated for and reached an oral agreement for the sale of its assets. On being advised that the negotiated transaction would result in a substantial tax, the corporation distributed its assets in a liquidating dividend, and the sale of the assets was carried out by the corporation's stockholders. In sustaining the Tax Court's conclusion that the sale had been made, in substance, by the corporation, this Court said, in language particularly appropriate here (324 U.S. at 334):

> The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. *A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title.* To permit the true nature of a

transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress. [Emphasis supplied.]

In the present case petitioner sought to obtain advantageous installment-sale tax treatment on the disposition of his ranch notwithstanding the purchaser's refusal to buy on such terms. On the advice of petitioner's attorney, a corporation was created with no other object than to act as an intermediary and give the purchaser the benefit of a cash purchase while allowing petitioner the tax advantages of an installment sale. Indeed, the evidence supporting the district court's conclusion that the Tower corporation was nothing more than a conduit is far more persuasive here than was the analogous evidence in *Court Holding*. For, as this record demonstrates, (1) a *written* contract of sale between petitioner and Sechrist was first executed (R. 27-31) (compare 324 U.S. at 334), (2) all the persons involved with the second agreement conceded that Sechrist expressly conditioned release of that contract upon a promise that he could make the same purchase from the corporation (R. 19-20, 23, 26), (3) petitioner obtained all the benefits of a cash sale by "borrowing" $200,000 from the corporation promptly after it received the purchase price from Sechrist, and (4) the corporation engaged

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Since the corporation paid the $58,000 mortgage and $15,000 in brokers' commissions, it netted $227,000. The $200,000 "loan" plus the $20,000 down payment transferred to petitioner substantially all the receipts of the sale.

in no other business and was dissolved as soon as it appeared that its continued existence would be burdensome. The corporation in this case was, like the corporation in *Gregory* v. *Helvering*, 293 U.S. 465, 469, "nothing more than a contrivance to the [tax avoidance] end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function. When that limited function had been exercised, it immediately was put to death."

There is surely no significance to the fact that petitioner did not own the Tower corporation. His relationship with the corporation's stockholders, who were petitioner's parents and his attorney, makes it obvious that the corporation was to act solely at petitioner's bidding and for his benefit. Nor is the arrangement saved merely because the attorney was to recover his fee from the corporation's "profits." In substance, this was nothing more than a payment to the attorney of a fractional share of the total receipts of the sale.

Nor is there any reason of policy to grant petitioner the benefit of installment-sale treatment on the proceeds of the sale. The installment sale provision "was designed to allow a taxpayer in the case of installment sales to spread the profit over the whole period during which payments were made * * *." *S. & L. Bldg. Corp.* v. *Commissioner*, 60 F. 2d 719 (C.A. 2), reversed on other grounds, 288 U.S. 406. In the present case, petitioner actually obtained the benefit of substantially all of the purchase price at the time the sale was made to Sechrist.

The district court properly held, therefore, that it was all to be treated as having been received in 1957.[5]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1961.

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[5] Petitioner contends that the *Court Holding* case has been nullified by Section 337 of the 1951 Code (Pet. 5). That section may have made the *Court Holding Co.* type of transaction unnecessary to achieve the tax benefits sought in that case, but it does not affect the authority of the principles applied in that case to issues such as the one presented here.

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